

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1130

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

LOUIS SORRENTINO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT LOUIS SORRENTINO

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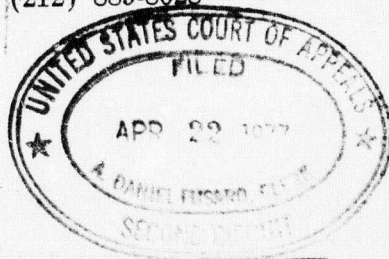


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Question Presented

When defense counsel was under indictment for violation of the federal narcotics laws, which indictment was then pending in the same district in which his client, appellant Sorrentino was being tried, and which investigation and indictment of counsel involved the same federal investigative body participating in the government's case against Sorrentino, is there a conflict of interest as a matter of law? If not a conflict of interest as a matter of law, then is due process satisfied by Sorrentino simply acknowledging in the course of a brief hearing that he was aware that his counsel was under indictment in that he had no obligations to being represented by such counsel without any further inquiry or reference being made to the then nature or type of indictment which his counsel was then under, or is the Court required to conduct an in-depth inquiry of the defendant Sorrentino, his counsel, to ensure that Sorrentino was fully advised as to all the relevant facts and was making a knowing waiver of the right to select other counsel?

Statement of the Case

I. History of the Case.

The appellant, Louis Sorrentino, was tried before the Honorable Edward Weinfeld, United States District Judge, and a jury, on September 8 and 9, 1976, in the United States District Court for the Southern District of New York, and was convicted on two counts contained in Indictment 76 Cr. 626. Said indictment charged three defendants, Sorrentino, Tate and Green, but only Sorrentino stood trial.

Sorrentino was convicted of having conspired to distribute cocaine, in violation of Title 21, United States Code, Section 846, and with having distributed and possessed, with the intent to distribute, approximately 55.94 grams of cocaine, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(A). On September 30, 1976, Judge Weinfeld sentenced Sorrentino to concurrent terms of three years imprisonment on each count and three years special probation.

Subsequent to said conviction and sentencing, Judge Weinfeld granted defendant's motion, pursuant to FRCP Rule 35, for re-sentencing by reducing his sentence from three years as aforesaid, to two years.

Defendant moved the United States District Court for the Southern District by notice of motion returnable March 1, 1977 for a new trial based upon the denial to defendant of his right to the effective assistance of counsel, which motion was heard and denied by Judge Weinfeld.

A notice of appeal from the aforesaid denial of defendant's request for a new trial, was filed on March 11, 1977.

II. *Statement of the Facts.*

Sorrentino's counsel at all stages of the proceedings herein up to and including trial and post-conviction sentencing, was James E. Siff, Esq. Mr. Siff had himself been indicted on July 21, 1976 for the possession of cocaine, in the United States District Court, Southern District of New York, Indictment 76 Cr. 666. Subsequent to Sorrentino's trial, and more specifically, on October 26, 1976, Mr. Siff entered a plea of guilty to a superseding information which charged him with possession of cocaine as a misdemeanor.

The charges which were pending against Mr. Siff during the time in which he was representing Sorrentino had been brought by the officer of the United States Attorney for the Southern District of New York, the same prosecutor which had brought the charges against Sorrentino. The evidence against Mr. Siff which presumably led to his indictment had been gathered by the same Federal Enforcement Office as had investigated the case against Sorrentino.

At a pretrial conference held before Judge Weinfeld on July 27, 1976, Mr. Siff appeared with Sorrentino, Assistant U.S. Attorney Federico Virella, and the attorneys for Sorrentino's co-defendants Tate and Green. A transcript of said hearing is made a part of the record on appeal herein, specifically a copy thereof being annexed as an exhibit to the affidavit dated February 24, 1977 of Ronald L. Garnett, Assistant U.S. Attorney made in opposition to defendant's motion for a new trial. Judge Weinfeld, who was apparently aware of the pending indictment against Mr. Siff, engaged Sorrentino and his counsel Mr. Siff, in a discussion regarding Sorrentino's cognizance of said indictment. The dialogue was as follows:

"The Court: Who is the lawyer who called chambers?

Mr. Siff: That was me, your Honor.

The Court: Well, now, is your client here?

Mr. Siff: Yes, your Honor.

The Court: Is your client aware of your difficulty?

Mr. Siff: Completely, your Honor.

The Court: Where is the defendant Sorrentino? Would you come forward, please.

Now, Mr. Siff, have you acquainted your client with the personal problem—

Mr. Siff: Thoroughly, your Honor, and in detail.

The Court: You have. Your own situation?

Mr. Siff: Yes, your Honor.

The Court: And Mr. Sorrentino, are you aware of the fact that your lawyer is in difficulty himself, he is under indictment?

Defendant Sorrentino: Yes, your Honor.

The Court: Would that make any difference as far as your desire to have him represent you? You say no, that would not make any difference, but you are prepared to have him represent you in connection with this charge?

Defendant Sorrentino: Yes.

The Court: You do not desire another lawyer?

Defendant Sorrentino: No." (Pp. 3-4 of transcript.)

As can be plainly seen from Judge Weinfeld's discussion with Mr. Siff and Sorrentino, there was no indication that Sorrentino had any knowledge of Mr. Siff's problems other than his affirmative response to the Court's inquiry as to whether he knew Mr. Siff was himself in difficulty and under indictment. There was no indication that Sorrentino had any specific knowledge or information regarding the indictment of Siff, nor did the Court inquire so as to determine whether or not Sorrentino possessed any knowledge of same. In fact, Mr. Siff states in his affidavit that his state of mind may have impaired his ability to defend Sorrentino.

It is appellant's contention that the indictment pending against Mr. Siff at the time of the representation of Sorrentino and all of the circumstances attendant thereto constituted such a conflict of interest as to warrant his removal from the case. Furthermore, the failure of the Court to make a full inquiry into the circumstances surrounding the indictment of Mr. Siff and to advise Sorrentino of same, rendered Sorrentino unable to make a knowing waiver of his right to select other counsel and caused him to pursue his defense without the effective assistance of counsel contemplated by the Sixth Amendment.

ARGUMENT

The Trial Court erred in failing to properly conduct an in-depth hearing to determine whether a conflict in interest existed between Sorrentino and his trial attorney, and in failing to fully advise Sorrentino of the possibility of such conflict as a prerequisite to a knowing waiver of his right to select other counsel, thus resulting in a dilution of the quality of representation guaranteed to the defendant by the Sixth Amendment.

The decision on whether a defendant has effectively waived his Sixth Amendment right to counsel depends "in each case upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *United States v. Calabra*, 467 F.2d 973 (1972).

The factors that the Supreme Court has considered in making the determination as to whether defendant has effectively waived his Sixth Amendment right to counsel are:

"whether the defendant understood that he had a choice between proceeding pro se and with assigned counsel, whether the defendant understood the advantages of having one trained in the law to represent him, and whether the defendant had the capacity to make an intelligent choice." *United States v. Spencer*, 439 F.2d 1047, (2d Cir. 1971).

The right to counsel guaranteed by the Constitution contemplates services of an attorney devoted solely to the interests of his client. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680. The admitted circumstances here cannot support a holding that defendant intelligently and understandingly waived his right to counsel.

Prior to the trial of this matter and more specifically on July 27, 1976, the Trial Court openly reflected on the fact that Sorrentino's trial counsel was, as put by the Court, "in difficulty himself." (See p. 3 of transcript of July 27, 1976 hearing.)

The difficulty being experienced by Mr. Siff, to which the Court only makes a passing reference, was Mr. Siff's indictment for having conspired to violate the federal narcotics laws and for having aided and abetted the distribution of cocaine. Not only was Mr. Siff being prosecuted in the Southern District, as was Sorrentino, but the investigation was being conducted by the Narcotics Unit in this district, the same one which was prosecuting the Sorrentino case.

The Court's response to all of this was limited to a routine query of Sorrentino as to whether he was willing to have Siff continue to represent him, without ascertaining the extent of Sorrentino's knowledge of the nature of the indictment against Siff.

It is the solemn duty of a federal judge before whom a defendant appears without counsel, to make a thorough inquiry and to take all steps necessary to insure the fullest protection of his Sixth Amendment constitutional right at every stage of the proceeding. *Johnson v. Zerbst, supra*, at 463; *Hawk v. Olson*, 326 U.S. 271, 66 S.Ct. 116, 90 L.Ed. 61. This duty cannot be discharged as though it were a mere procedural formality.

We start here with the principle, recognizable as being implicit in our concept of ordered liberty, that:

"The right to effective representation by counsel whose loyalty is undivided is so paramount in the proper demonstration of justice that it must, in some cases, take precedence over all other considerations, including the expressed preference of the defendant's concerned and their attorney." *U.S. v. Carrigan & White*, 543 F.2d 1053, 2d Cir. 1976 (Lumbard J., concurring).

The contention that Sorrentino's right to the effective assistance of counsel was compromised by Siff's participation as his trial counsel requires, in the first instance, an assessment of the inquiry conducted by the Trial Court. Here, the initial determination must be whether there was a knowing waiver by Sorrentino of the right he doubtless had to select other counsel to defend him.

As the Court of Appeals stated in *Carrigan, supra*, at 1055:

"the proper course of action for the trial judge (to take where the possibility of a conflict exists) is to conduct a hearing to determine whether a conflict exists to the degree that a defendant may be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment. The defendant should be fully advised

by the trial court of the facts underlying the potential conflict and be given the opportunity to express his views. *U.S. v. Mari*, 526 F.2d 117, 119 (2d Cir. 1975); *United States v. DeBerry*, 487 F.2d 488, 453 (2d Cir. 1973); *United States v. Alberti*, 470 F.2d 878, 881 (2d Cir. 1972), cert. denied 411 U.S. 919, 93 S. Ct. 1557, 36 L.Ed. 2d 311 (1973)."

The purpose of the mandated hearing to be held by the Court is to determine whether Siff's role as the advocate for Sorrentino was to be in any way less vigorous than would have been the case had counsel not been under indictment himself.

In *United States v. DeBerry*, *supra*, at 453, the Court stated:

"the Trial Court should have conducted the most careful inquiry to satisfy itself that no conflict of interest would be likely to result and that the parties involved had no valid objection.

It is true that here, on the second day of trial, at the time of the colloquy previously referred to, counsel for both defendants did assure the Court that 'I have explained and gone over all of the facts with both of these defendants in my office numerous times . . . (W)e have discussed it very carefully and I have been very careful about this.' *This is quite another thing, however, from the Court's interrogating the individual defendants themselves.*" (Emphasis added.)

We deal first with the adequacy of the Trial Court's inquiry as to Sorrentino's waiver of an apparent impediment to Siff's continued participation as his counsel. When weighed against the Court's determination in *Carrigan*, *supra*, at 1055, that a "record barren of any inquiry by the Court or any concern by the government" was in suffi-

cient as a basis for the required judgment as to the existence of a possible conflict, the inquiry conducted by the Trial Court in connection with the Siff prosecution fails to pass the standards set down for such a hearing. *Carri-gan* stands for the proposition that given a potential conflict, such as was supplied here by Siff's indictment, the Trial Court is required absolutely to carefully inquire as to the possibility of prejudice.

What all this does is emphasize the inadequacy of the Trial Court's inquiry as to Sorrentino's selection of counsel. Just as the Court should have required Siff to disclose the current status of the case pending against him, counsel for the government should have seen it as his duty to put himself in a position to thoroughly advise the Trial Court as to the varying aspects of the Siff prosecution. The Second Circuit, in *Morgan v. United States*, 396 F.2d 110, 116 (2d Cir. 1968), would seem to sanction a private disclosure to the Court of all the surrounding relevant facts. In any event, the Second Circuit has already rejected the notion that specific prejudice must be shown to support a claim of ineffective assistance of counsel, based on a conflict in preference to a less rigid standard. See *United States v. Olsen*, 453 F.2d 612, 616 (2d Cir. 1971).

It would seem, moreover, in the context of this case, that Sorrentino's representation was so pregnant with potential prejudice that the Trial Court should have found a conflict to exist as a matter of law. See *The NKC Organization Ltd. and W. E. Greene Jr. v. Bregman*, 542 F.2d 128 (2d Cir. 1976).

When these facts are related, it becomes even more apparent, especially in light of the decision in *U.S. v. Deberry*, *supra*, that "however well-intentioned . . . (the inquiry by

the Trial Court in this case was) not sufficient to establish the absence of prejudice" (*id.* at 453, fn. 6).

When confronted with the argument that Appellant was deprived of his constitutional right to effective assistance of counsel, the Second Circuit Court of Appeals in *United States v. Foster*, 469 F.2d 1, 3 stated:

"Both common sense and authority, see, e.g. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), instruct us to scrutinize the record with great care when such an allegation is made . . . this court is peculiarly sensitive to a showing of conflict of interest, if such can be suggested."

The Court went on to state that: "When a satisfactory inquiry does not appear on the record, the burden of persuasion will shift to the government." (*Id.* at 5). Thus, the onus is properly on the government "to demonstrate from the record that prejudice to the defendant was improbable." (*Id.* at 5).

Stated another way, as put by the Court in *Carrigan, supra*, at 1056 "the lack of satisfactory judicial inquiry shifts the burden of proof on the question of prejudice to the government."

In their memorandum of law in opposition to the appellant's motion for a new trial, the government sought to draw a parallel between the instant matter and the case of *United States v. Robert Stone*, 76 Cr. 790 (S.D.N.Y.).

In the *Stone* case, a matter tried a few weeks subsequent to the trial in the within action, the defendant was also represented by Mr. Siff, but there the similarity ends.

On September 15, 1976, prior to the commencement of the trial in the *Stone* action, Judge Wyatt, the trial judge

in the *Stone* matter, inquired of Mr. Siff concerning his indictment in this district. Siff told the Court that he had previously advised his client of his own indictment, and the possible conflict it presented. Judge Wyatt then confirmed that defendant Stone had been advised by Siff that Siff was under indictment for narcotics offenses in this district. Judge Wyatt then inquired whether Stone wished Siff to continue as his attorney, and Stone answered in the affirmative.

Unlike the hearing in the within action, the hearing held by Judge Wyatt made clear to Mr. Stone that Mr. Siff was being prosecuted in the same district and by the same Narcotics Unit as was prosecuting Mr. Stone.

Moreover, the questions raised in the appeal of the *Stone* case involved more issues than defendant's deprivation of the effective assistance of counsel. Some of these questions involved the admission of certain hearsay statements and a denial by Judge Wyatt of a motion by defendant Stone to suppress certain evidence.

In the *Stone* matter, the question of Siff's conduct during the course of the trial was not a major point raised by the defendant on appeal. However, in the instant action, Mr. Siff made it clear in his affidavit attached to appellant's moving papers, that his judgment at the time of the Sorrentino trial was sorely affected by the surrounding events and certain crucial decisions during the course of the trial may clearly have been motivated by a desire not to antagonize the offices of the prosecution and the investigators who were involved in his own case. As Mr. Siff himself admitted, his decision not to allow Mr. Sorrentino to testify was made despite Mr. Sorrentino's strenuous objections and stated desire to take the stand.

In *Von Moltke v. Gillies*, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948), the Supreme Court stated:

"The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid, such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered."

Conclusion

Appellant Sorentino should be granted a new trial by reason of the fact that he was denied his constitutionally guaranteed right to the effective assistance of counsel.

Respectfully submitted,

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